At the Supreme Court Sitting as the High Court of Justice

HCJ 495/12

Before:	**Honorable Vice President M. Naor** **Honorable Justice E. Rubinstein** **Honorable Justice Z. Zylbertal**
The Petitioners:	**1. Azza Izzat** **2. Suhair Abd al-Majid** **3. Andaleeb Hussein** **4. Amal Nimr** **5. Loujain Sharhabeel** **6. Gisha – Legal Center for Freedom of Movement** **7. Al Mezan Center for Human Rights**
	v.
The Respondent:	**1. Minister of Defense** **2. Military Commander of the West Bank** **3. Coordinator of Government Activities in the Territories** **4. OC Southern Command**
Response to *Order Nisi*	
Session date:	28 Av 5772 (18 August, 2012)
Representing the Petitioners:	Adv. Dr. Nomi Heger;
Representing the Respondent:	Adv. Aner Helman; Adv. Roi Shweika

Judgment

Justice E. Rubinstein

1. Once again, we address the painful issue of the wish of residents of the Gaza Strip – in this case four women – to study at a university in the Judea and Samaria Area. This issue is inextricably linked to an even more painful issue, the tragic affair of Gaza-Israel relations at the present time, when Gaza is ruled by Hamas, a hostile terrorist entity both in theory and in practice and the Respondents' policy, which stems from such a situation and which has been in effect since at least 2007. The question before us is whether, from a legal perspective, the Respondents can be

compelled to allow Petitioners 1-4, who were joined by two organizations, one Israeli and one Palestinian (Petitioners 6-7), to travel to the Judea and Samaria Area through Israel for the purpose of academic studies, remain there for a few days every week and travel home weekly (with the exception of Petitioner 1, who is willing to remain in the Judea and Samaria Area/West Bank for four consecutive months). It should be noted that an additional Petitioner was withdrawn from the petition. An *order nisi* was issued on August 9, 2012 (Justices Hayut, Fogelman and Amit presiding). We heard the case on August 16, 2012.

The petition

2. The following is the subject of the petition in brief. Petitioners 1-4 are women who reside in Gaza. Their ages range between 37 and 49. They took up Master's degree studies at Birzeit University in the Judea and Samaria Area prior to the incidents that began in 2000 (which are commonly referred to as the Second Intifada). They were admitted by the university to resume their studies in the semester that begins in September 2012. The petition was submitted on January 18, 2012. Petitioner 1, age 49, is described as a development and human rights consultant who wishes to study human rights and democracy at Birzeit. Petitioner 2, age 37, works as the women's project manager with the Palestinian Union of Agricultural Work Committees and wishes to study gender, law and development. Petitioner 3 is 46 years old. She served as the chair of the board of directors and executive director of the Community Media Center in Gaza and also wishes to study gender, law and development. Petitioner 4, age 42, the administrative director of the Women's Affairs Center in Gaza, wishes to do the same. The petitioners present themselves as involved in promoting human rights and insist on completing their Master's degrees at Birzeit University, which offers a human rights and democracy program that is suitable for them.

3. On the legal level, it was argued that the denial of their request to travel to the Gaza Strip for the purpose of academic studies contradicted the recommendations made by this Court in HCJ 11120/05 **Hamdan v. OC Southern Command** (unpublished, August 7, 2007), to which we shall return. In that judgment, the possibility of conducting individual screenings in cases "whose solution is likely to have positive human implications" was mentioned. Reference was also made to HCJ 4906/10 **Sharif v. Minister of Defense** (unpublished). It was noted that three students from Gaza were permitted to travel to the West Bank for the purpose of academic studies as part of an American-Palestinian program and that merchants and athletes were also given permission. The petition refers to a document from May 5, 2011on the policy regarding movement of people between Israel and Gaza, published by the Coordinator of Government Activities in the Territories (COGAT) (P/20). According to the Petitioners, thousands of people travel to Israel every month, including individuals going on family visits and merchants. The number was1,340 in November alone. It was alleged that according to the Ministry of Foreign Affairs website, in 2010, the number of people who exited stood at 30,900 and in 2011, it was 38,706, which showed that the number of exits was substantial (in response to further details following issuance of the *order nisi*, the Respondents stated that over the course of 2011, 20,031 people from Gaza who were neither patients nor their escorts, entered Israel from the Gaza Strip. This number includes 15,337 merchants and 1,127 staff members of international organizations. Merchants enter for a periods of time from a week up to three months). The spokesperson for COGAT was quoted as saying (December 1, 2011) that, "The civil Policy [*sic*] towards the Gaza Strip deals with trade, export of agricultural goods, projects of infrastructure, education, health, water, electricity and the movement of people - all important to life in Gaza. These competent [*sic*] separate between the civil population and the terror organization. This isn't just humanitarian activity and the transfer of patients, like everybody thinks". According to the petition, granting permits to the Petitioners would have "positive human implications", as stated in **Hamdan**, since the Petitioners would be able to positively influence Palestinian society through women's empowerment and its positive

ramifications. It would also fall within the framework of freedom of occupation. It was argued that individual screenings would counteract risk factors and in any case, these were older women who did not pose a risk in and of themselves. It was further argued on the legal level that Israel had humanitarian obligations towards residents of the Gaza Strip according to HCJ 9132/07 **al-Bassiouni v. The Prime Minister** (unpublished) and that the Petitioners' rights, including freedom of movement, freedom of occupation and the right to education, were being violated disproportionately.

The response to the *order nisi*

4. For the sake of brevity, we shall address the response to the *order nisi* submitted by the Respondents on August 13, 2012. The affidavit of Major General Eitan Dangot, The Coordinator of Government Activities in the Territories stated that the Petitioners, foreign nationals who are residents of Gaza, had no legal right to enter Israel and that the decision in their case had been made according to government policy whereby entry into Israel by Gaza residents, even if only for the purpose of traveling to the Judea and Samaria Area, is limited to humanitarian cases only with an emphasis on urgent medical cases (with the exception of merchants). It was noted that an armed conflict has been conducted against Israel by Palestinian terrorist organizations since 2000, that this conflict intensified after the disengagement in 2005 and that Hamas took control of the Gaza Strip in 2007. Therefore, the Cabinet decided (on September 19, 2007) to restrict travel into and out of the Gaza Strip. Reference was made to the judgment given in **al-Bassiouni**, according to which (in President Beinisch's opinion): "… [T]he primary obligations borne by the State of Israel with regards to the residents of the Gaza Strip are derived from the state of armed conflict…" (§12). We were also referred to **Hamdan**, in which the petition was ultimately dismissed, and to the broad discretion of the government to determine who may enter the country which has been recognized in extensive case law, for instance, recently, in AAA 4620/11 **Qishawi v. Minister of Interior** (unpublished) according to which "foreign nationals have no vested right to enter the territory of the State of Israel… this rule also applies to applications for entry permits made by residents of the Gaza Strip". It was argued that the policy of imposing restrictions on travel into and out of the Gaza Strip was part of Israel's battle against Hamas, including the policy of separation between the Judea and Samaria Area, ruled by the Palestinian Authority and the Gaza Strip, ruled by a terrorist organization. It was recalled that judicial policy, as in the recent **Qishawi** judgment, has been to refrain from intervening in the Respondent's considerations and the major humanitarian grounds for granting permits to exit the Gaza Strip to Israel were specified. These include medical issues or visiting the infirm, as well as visits for weddings or funerals. It was stated that individual screenings were conducted only in cases that presented exceptional humanitarian grounds. However, it was argued that academic studies did not constitute a humanitarian need. This was so not only for reasons of security, but also due to political considerations, in view of the decision to separate and distinguish Gaza from the Judea and Samaria Area. It was noted that since the **Hamdan** judgment was issued in 2007, the policy has been somewhat relaxed, such as [permission for] individuals in receipt of recognized academic scholarships for studies abroad to exit Gaza via Israel – referred to as the "scholarship recipient protocol". It was also noted that the Rafah crossing into Egypt was open, such that Gaza residents had more options for academic studies than in the past. The Respondents argued that the relaxation of restrictions over the years, such as in the case of merchants and staff members of international organizations, was meant to allow goods to enter Gaza and facilitate internationally funded projects. As for students who entered Israel as part of a program run by the American State Department, these exit permits were granted for reasons relating to foreign policy. It was finally argued that the Petitioners were security screened on an individual basis and that Petitioners 1-2 were under a security preclusion (the matter of Petitioners 3-4, if necessary, would be further examined) and the request for weekly travel by three of them made matters more difficult.

5. In a brief submitted by the Petitioners, they argued that there was no need to make a ruling on the general policy to prohibit academic studies by Gaza students, but rather, a ruling was required on the question of applying the instruction given in **Hamdan** with respect to the issue of an exceptions committee for cases with "positive human implications". This was all the more the case after the Respondents' policy had become more flexible in various ways on issues such as family visits, family events, sports, workshops, summer camps etc. It was further stated that just as Israel had an interest in economic development in the Gaza Strip, it also had an interest in the advancement of women and their participation in the economy and that promoting women's status was a humanitarian goal (it was recalled that in July, Petitioner 3 was granted a permit to participate in a workshop for the promotion of women's status). It was further stated that as far as the Respondents were concerned, the core issue was not transit through Israel, but rather the separation policy, as transit permits were being granted. It was also argued that there was no security preclusion against the Petitioners – this was stated by the Respondents in response to a question posed by Justice Joubran at the hearing on May 23, 2012. The Petitioners stated that they were concerned solely with women's empowerment and with studying for this purpose. The request was, therefore, for individual consideration, even within the restrictive travel policy, by establishing an exceptions committee.

The hearing

6. In the hearing held before us, Adv. Helman, acting for the Respondents, emphasized once more that the rule on entry was humanitarian cases and that students did not meet this criteria. It was further argued that residents of Gaza had no right to education in Israel or to freedom of movement into its territory, especially considering the fact that the Rafah crossing is open and it is possible to take up academic studies anywhere in the world. It was further stated that terrorist attacks were being carried out from Gaza on a daily basis and, therefore, Israel was interested in preventing travel from Gaza to the Judea and Samaria Area. Individual screening was impossible even in the Judea and Samaria Area, where the IDF was present, let alone – it was alleged – in Gaza. Furthermore, no country in the world would allow residents of a different political entity that was involved in a daily war against it to enter its territory.

7. Counsel for the Petitioners argued that Petitioner 1 was willing to remain in the West Bank for the duration of the academic study period without returning. It was recalled that her family had suffered a trauma as a result of being used as a human shield and that she was in poor health. Even if there were security allegations against her family, they did not apply to her. The same was true – it was argued – for Petitioner 2, one of whose brothers had been a security prisoner many years ago. Petitioners 3-4 have travelled through Israel for conferences on the advancement of women before and the last time Petitioner 3 did so was on June 27, 2012.

Ruling

8. I do not deny that I have had great difficulty reaching a decision in this case and I have delayed a while in order to ponder it once more as I felt it was appropriate to look for a way to help some of the Petitioners, those not under a security preclusion, obtain what they request, even if subject to certain conditions. However, I initially had trouble finding a **legal anchor** for **compelling** the authorities with regards to this issue in the current state of affairs. As is known, we are not entrusted with policy making, nor are we to address its wisdom (see **al-Bassiouni**, §20), and even the "activists" would probably agree with the remarks made by American Supreme Court Chief Justice Roberts in the recent ruling in the health insurance case (National Federation of Independent Business v. Sebelins). Chief Justice Roberts, who backed upholding the law from a legal standpoint, despite having misgivings about its content, noted that:

> Members of the Court are vested with the authority to interpret the law; we possess neither the expertise nor the prerogative to make policy judgments. Those decisions are entrusted to our Nation's elected leaders, who can be thrown out of office if the people disagree with them. It is not our job to protect the people from consequences of their political choices.
>
> Our deference in matters of policy cannot, however, become abdication in matters of law.
>
> (Cited by me in HCJ 5113/12 **Friedman v. Knesset of Israel** (unpublished)).

9. However, at the end of the day, I have reached the conclusion that, based on the Respondents' own official policy, there is room to establish an exceptions committee, as described below. In **Hamdan**, which addressed young students who sought to travel from Gaza to the West Bank for the purpose of academic studies, I had occasion to say, and the remarks are relevant here too, perhaps even more so, that "This petition raises a legal and human question which, in the circumstances of the Palestinian-Israeli conflict whose solution, unfortunately, does not appear to be near, creates a gap between what is and what should be, the bridging of which is difficult at this time… *Prima facie*, the petition appears to present a simple human wish, and with it a legal question of the reasonability of the policy that places general restrictions in this sphere. However, the background subject, which cannot be avoided when considering a solution, is the situation between Israel and the Gaza Strip (at least), which is difficult, abnormal and plagued by terrorism, and the difficulty in solving dilemmas which stem from the situation in a way that is both acceptable to Israel, which is combating terrorism, and also solves personal and human problems on a wide scale. It seems to be a no win situation" (§11 [*sic, should read §1*]). It was further stated there (§12) that: "There is no doubt that for the sake of hope for the future and nurturing peace, and out of respect for the para-medical care and rehabilitation occupation and the possibility that occupational therapists will provide humanitarian assistance in Gaza, it is worthwhile to seek out any opening or crack which could make that possible. Ultimately, the Palestinians and Israel must live side by side". It was also stated that the circumstances of Hamas' takeover of Gaza had not brought Gaza closer to the Judea and Samaria Area or to Israel in terms of diplomatic relations, unlike geography, which remains unchanged: "Thus, we cannot ignore this, and say to the security officials that all is well in the world and please allow Petitioners their request, when in reality, the world is very harsh" (*Ibid.*) It was further stated, as part of the review of the legal arguments, that "It is clear that the law is not the focus of the circumstances, which are unique – *sui generis* in the full sense of the term – and thus they also call for solutions which are more practical and creative than a legal hearing about shifting sands" (§13).

10. The dispute in that case ultimately revolved around the question of whether "it is possible to locate those not involved in terrorism through an individual screening. We do not deny that as a wish, in a better world… individual examination is the mechanism that reaches a more just result…" (§16). However, we did not find then that the considerations employed by the Respondents, who objected to this given that students fit a high-risk profile, were extremely unreasonable.

11. In the conclusion of my opinion, I stated with the assent of my colleague Justice Hayut and the dissent of my colleague Justice (as was his title then) Elon as follows:

> … [W]e do not deny that in our opinion, to the extent that it is possible to find a way to perform individual screenings, this would be appropriate and

> helpful… Among the questions which, in our opinion, are worth examining at the appropriate governmental level, is the question of whether there is indeed no way – as part of a search for balance – to establish an 'exceptions committee' or another similar mechanism, that would deal with cases whose solution is likely to have positive human implications on an individual basis, in addition to the indubitably humanitarian cases of people in need of very urgent medical care.

12. I have quoted extensively from **Hamdan**, since, though five years have passed, the dilemmas raised therein have remained fundamentally the same, as evidenced in the judgment recently given in **Qishawi**, in which Justice Fogelman stated (§6): "According to Respondents' policy which is in effect and which is based, *inter alia*, on the decision of the Ministerial Committee for National Security of December 2007, permits to enter Israel are granted to Gaza residents only in exceptional humanitarian cases, such as visits for medical reasons… Considering this policy, applications for permits to enter Israel made by Gaza residents are examined individually only if they have been found to present exceptional humanitarian grounds… this Court has ruled more than once that there was no room for intervention in this policy, subject to the fact that in exercising their discretion, the competent authorities give appropriate weight to humanitarian considerations… this, considering the changes that have occurred in the scope of the State's obligations toward residents of the Gaza Strip in the context of the implementation of the Disengagement plan in 2005 and Hamas' rise to power… It has been ruled, inter alia, that entry into Israel for the purpose of visiting incarcerated relatives, travel through Israel for the purpose of studies in the West Bank and family visits in the West Bank – do not constitute exceptional humanitarian grounds justifying entry into Israel as part of the current policy…"; see also citations therein from judgments given between 2007 and 2010.

13. Thus, over the years, this Court has not seen fit to judicially intervene in the Respondents' policy by way of absolute orders, considering the - almost hopeless - complexity of the situation and its great sensitivity. However, comments made by the Court and the dialogue it has conducted with the Respondents in hearings or through recommendations made in its decisions have resulted, more than once, in some change in one direction or another. One example, mentioned also by counsel for the Respondents, is our reservations about the distinction between entry into Israel by patients in need of "life saving" treatment as opposed to "life enhancing" treatment, such as, God forbid, for the loss of eyesight or the loss of an arm or a leg (HCJ 5429/07 **Physicians for Human Rights and Gisha v. Minister of Defense** (unpublished, 2007). The Respondents accepted this position. Furthermore, regardless of the Court, the material presented to us indicates that, due to various considerations, some humanitarian, some political and some mixed, the Respondents have significantly increased entry into Israel, as in the examples mentioned above.

14. The Petitioners attached (P/20) the aforementioned document published by the COGAT's spokesperson, updated as of May 5, 2011, which presents the policy on exit from the Gaza Strip and entry into Israel, as well as entry into Gaza, in detail. Within the confines of the policy (Sec. 1), the document states that: "Israel holds the position that the law of belligerent occupation no longer applies to the relationship between it and the residents of the Gaza Strip and that Israel therefore no longer bears an overall responsibility for the welfare of the population but only basic humanitarian obligations with respect thereto". Yet, it was also stated (Sec. 6) that in addition to the established criteria: "all applications are reviewed on their merits, according to the individual circumstances of each and every case and according to an individual security check relating to the applicant and/or his relatives, and a review of the security, political and strategic interests of the State of Israel in approving the applications. The authenticity of the attached documents is also examined". This is a type of "litigant confession" that an individual examination of "all applications" is carried out. The

headings contained in the document for the criteria for entry into Israel (exit from Gaza to Israel) are: medical treatment; medical crews (including training); visiting a seriously ill relative; attending a funeral, or, quite differently, a wedding; children who accompany adults entering under the previous criteria; merchants (70 per day); senior Palestinian officials; Palestinians in the process of family unification; scholarship recipients intending to study abroad; foreign (dual) nationals; Palestinian employees of international organizations; Palestinians whose official address is in the Judea and Samaria Area for the purpose of returning to the Judea and Samaria Area; journalists; threatened individuals; soccer players; individuals entering for Palestinian Authority conferences and events. The criteria for permission to enter the Gaza Strip are also listed. We shall not detail them for the sake of brevity.

15. We have thus seen that over time, the criteria for entering Israel from Gaza have been expanded, which is, of course, to be welcomed, not forgetting for an instant that the **fundamental** situation vis-à-vis Gaza and those in control thereof has not changed and that even if it does not, thank God, compare to the most difficult times we have seen over the years, it is still a long way from stability and rockets from Gaza still land on the homes of civilians inside Israel even at the time this judgment is written.

16. The Petitioners also referred in their petition to a COGAT document dated December 1, 2011, which contains statements made by COGAT Spokesperson, Major Guy Inbar. I have taken the trouble of looking at the December 1, 2011 posting on the COGAT's website. The quote from the Spokesperson is as follows:

> The civil Policy [*sic*] towards the Gaza Strip deals with trade, export of agricultural goods, projects of infrastructure, education, health, water, electricity and the movement of people- all, important to life in Gaza. These competent [*sic*] separate between the civil population and the terror organization. This isn't just humanitarian activity and the transfer of patients, like everybody thinks.

17. It seems, then, that the picture is more complex and has more shades than the dichotomy which was expressed in our judgments as well. Indeed, according to the arguments presented to us by the Respondents, the official policy has not changed since **Hamdan**, but various official announcements as well as reality point to developments in different directions. I stress; there is no dispute between the parties, and in any event, there is no doubt, that in the – unfortunate – circumstances, the Respondents are entitled to employ a policy that restricts entry into Israel as well as a policy that separates between Gaza and the West Bank in order to safeguard Israel's security and political interests, as is their responsibility. There is also no doubt that they may weigh broad political considerations in the implementation of the policy, whether these take the shape of economic-humanitarian considerations, such as in the case of merchants, or broader foreign policy considerations. Indeed, Israel has obligations on the humanitarian level (**al-Bassiouni**), even in times of war (for example, Operation Cast Lead, see for example, HCJ 201/09 **Physicians for Human Rights and Gisha v. Prime Minister** (unpublished)). However, it cannot be said that Israel's humanitarian obligations include freedom of occupation and freedom of movement in a literal sense, as a given. These are residents of a foreign entity. The Petitioners would not argue that a Canadian resident is entitled to "ordinary" civil rights in the USA other than by agreement between the two countries. However, Israel's position *vis-à-vis* the Palestinians, on both sides, the Judea and Samaria Area/West Bank and Gaza, is not "normal". It is complex and unique, as evidenced by the security issues on one hand and the humanitarian obligations on the other.

18. This is not the place to address the interpretation of humanitarian obligations. Yet, even if we presume that they do not include the right to study in the Judea and Samaria Area and travel through Israel, particularly given the opening of the Rafah crossing and the possibility of traveling to various countries (see **Qishawi**), the question is whether there is room to conclude **from the Respondents' own policy**, as specified, and in view of the variety of possibilities, that there is a need for an exceptions committee, as we suggested in **Hamdan**; and whether we must issue an order in this matter, within the context of the reasonableness of an administrative act. Not without debate, as I have stated, in my view, the answer is, ultimately, affirmative. I stress: because the Respondents themselves, as indicated by their statements, declare that all applications are reviewed, rather than just humanitarian cases in the narrow sense, and since there may be exceptions even to the many categories included in the criteria, it is appropriate, in terms of administrative law, to establish an official exceptions committee to which individuals may turn. Indeed, the original remedy sought related to the specific Petitioners, but as the matter developed, it has become apparent that, at least, the establishment of an exceptions committee is required.

19. In Sec. 6 of the May 5, 2011 policy paper, which has not been denied and which has been quoted above and shall be quoted again, the Respondents describe that: "In addition to the criteria for reviewing applications to enter Israel, which are determined periodically, all applications are reviewed on their merits, according to the individual circumstances of each and every case and according to an individual security check relating to the applicant and/or his relatives, and a review of the security, political and strategic interests of the State of Israel in approving the applications. The authenticity of the attached documents is also examined". The aforementioned release from COGAT's spokesperson dated December 1, 2011 describes a policy that "distinguishes between the civilian population and the terror organization Hamas. This isn't just humanitarian activity and the transfer of patients, like everybody thinks". These indicate that there is a certain margin, within the Respondents' policy, for individual examination of applications relating to various issues and for a distinction between the "ordinary" civilian population and Hamas members, and that, according to the May 5, 2011 document, as described, there is a large variety of "institutional" exceptions. All of these are ostensibly developments from the past five years, perhaps following lessons learned after **Hamdan**. Under these circumstances, there is *prima facie* cause to establish an exceptions committee that would consider individual applications, within the parameters of the two legitimate foundations of the policy presented: namely, limiting travel inside Israel by Gaza residents and separating and distinguishing Gaza from the Judea and Samaria Area. It is clear that security risks would play a central role in the review conducted by the committee. It is also fair to presume that even if it is more difficult to perform security screenings in an area where Israel has no presence, or even in one where it is partially present (the Judea and Samaria Area) – it is not impossible. This is evidenced by the fact that merchants enter regularly and it is presumed that security has not, God forbid, been forfeited with respect to them. It is also evidenced by the fact that a screening was possible also in the case of the Petitioners, even if not fully completed. The committee will review the applications of the Petitioners, who, and we make no conclusive ruling on this issue, claim they do not fit a high risk profile. Their applications will be reviewed inasmuch as there is indeed a distinction between the civilian population and Hamas and inasmuch as it is relevant to some or all of the Petitioners.

20. Note well: the aforesaid does not constitute the determination of a new policy for the exceptions committee once it is established. Certainly, both security and political issues will guide its actions, as aforesaid. However, the committee will be able to examine the balance between the difficulty and the benefit in those cases that present cause in terms of Israel's policy and which Israel is willing to examine from a perspective that distinguishes between the "ordinary" civilian population and Hamas (without making conclusive findings) and which offer a human benefit in the broad sense – the very "positive human implications" mentioned in **Hamdan**.

21. Should my opinion be accepted, a decree absolute shall be issued ordering the establishment of an exceptions committee, following the parameters set out above. I would not issue a costs order.

22. Upon reading the opinions of my colleagues, and as I remain in dissent, I shall add the following: I wholeheartedly agree that the State of Israel has the right to prevent foreigners from entering its territory. In HCJ 466/07 **The Association for Civil Rights in Israel v. State of Israel** (the second family unification case, unpublished), I noted (§4 of my opinion) that the main reason for my position therein was that "Israel – like any other country, and all the more so given that it is in a state of armed conflict – has a right to limit the entry of enemy subjects into its territory, as do many other nations". My position has not changed. However, the case at bar does not concern family unification, but rather the possibility of entry **for the purpose of transit** by Palestinians in cases that may have a positive impact, according to the Respondents' **official** policy. Moreover, I myself am of the opinion that a formal statement by a spokesperson, in real time, as a functional tool of his trade, reflects policy and we must treat it as such. Indeed, I do not make light of the difficulty in conducting individual screenings, but it is certainly done with respect to merchants and has also been partially possible in the case at bar.

23. Indeed, the result reached by my colleagues is certainly possible, and I have not, for a moment, lost sight of the conduct of those who are in control of the Gaza Strip and their responsibility. However, I myself hold the position that in the abnormal state of affairs in which we live, solutions that would go hand in hand with the Respondents' official policy and would not contradict it are possible in certain cases. In any event, in the circumstances, we shall wait for better days.

Justice

<u>Vice President M. Naor</u>

1. Should my opinion be accepted, we shall revoke the *order nisi*, dismiss the petition and not order the establishment of an exceptions committee as suggested by my colleague, Justice Rubinstein.

2. I have just recently concurred with the opinion of Justice Fogleman in AAA 4620/11 **Qishawi v. Minister of Interior** (unpublished, August 7, 2012), which was cited by my colleague. Remarks made therein express my opinion. Indeed, as written therein, "the premise for review is that as accepted in any sovereign state, foreigners have no vested right to enter the territory of the State of Israel". In **Qishawi**, Justice Fogelman noted that the Court had ruled more than once that there was no room for intervention in the Respondents' policy whereby applications for permits to enter Israel made by Gaza residents are examined individually only if they have been found to present exceptional humanitarian grounds. It was further mentioned therein that "entry into Israel for the purpose of visiting incarcerated relatives, **travel through Israel for the purpose of studies in the West Bank** and family visits in the West Bank do not constitute exceptional humanitarian grounds justifying entry into Israel" (emphasis added. See further, albeit in brief, regarding other students: HCJ 4906/10 **Sharif v. Minister of Defense** (unpublished, July 7, 2010)). My colleague also agrees that over the years, this Court has not seen fit to intervene in the Respondents' policy and it is my opinion that there is no reason to depart from the judgments rendered over the years, and recently in **Qishawi**.

3. My colleague describes the – almost hopeless – complexity and sensitivity of the issue. With that, I must regretfully concur. At the present time, it does not seem that the difficult reality is going to change in the foreseeable future. However, I see no room to force an exceptions committee upon the respondents. I accept the Respondents' position that they have no way of conducting individual

security screenings for persons seeking entry from the Gaza Strip (see and compare my position on the issue of the absence of a possibility to perform individual screenings on the issue of family unification, a matter that concerned the interest of Israeli citizens, unlike in the case at bar, which concerns the request of foreign nationals: HCJ 7052/03 **Adalah Legal Center for Arab Minority Rights in Israel v. Minister of Interior**, IsrSC 61(2) 202, 521-531 (2006)).

4. I also wish to repeat comments I made to the Petitioners and to other public petitioners in the courtroom: Unfortunately, any "exception" (and the essence of an exceptions committee is to allow exceptions), including an exception made by the Respondents at the recommendation of this Court, leads to allegations of discrimination in other petitions. It is difficult to counter an allegation of discrimination when it comes to individuals of a similar background, such as students. Therefore, with the exception of cases in which the grounds provided relate to essential medical treatment, I would not force the Respondents to create exceptions or to establish a mechanism for determining exceptions. Indeed, the State sometimes grants permits that stem from its policy on trade, agricultural export etc. I believe this should not be seen as a departure on the part of the Respondents from their policy over the years. A country may allow individuals to enter in order to further goals it wishes to further for some reason or another at any given time, but it does not have a duty to do so and there is no room for the Court to force it to do so.

5. As stated, should my opinion be accepted, we shall revoke the *order nisi* and dismiss the petition with no costs order.

Vice President

Justice Z. Zylbertal

1. I concur with the opinion of my colleague, Vice President **M. Naor** and her reasoning. I have seen fit to add a few remarks to clarify my position.

2. Respondents' policy with respect to granting Gaza residents permits to enter Israel has been reviewed by this Court time and time again and no cause for intervention has been found. Only recently, it has been explicitly ruled that "… applications for permits to enter Israel made by residents of the Gaza Strip are examined individually only if they have been found to present exceptional humanitarian grounds…" (§6 of the opinion of Justice **U. Fogelman** in AAA 4620/11 **Qishawi v. Minister of Interior** (unpublished, August 7, 2012). In the case at hand, the Petitioners' request has not been found to present "exceptional humanitarian grounds". In light of all the above, the foundation of their petition is the argument that the "instruction" given by this Court in HCJ 11120/05 **Hamdan v. OC Southern Command** (unpublished, August 7, 2007) must be implemented and their applications must be individually examined, despite the fact that they do not meet existing criteria for granting an entry permit. With this claim, the Petitioners aim at the following remarks, made in **Hamdan**:

> … [T] o the extent that it is possible to find a way to perform individual examinations, this would be appropriate and helpful… Among the questions which, in our opinion, are worth examining at the appropriate governmental level, is the question of whether there is indeed no way – as part of a search for balance – to establish an 'exceptions committee' or another similar mechanism, that would deal with cases whose solution is likely to have positive human implications on an individual basis, in addition to the indubitably humanitarian cases of people in need of very urgent medical care.
> (§17 of the opinion of Justice A. Rubinstein).

In light of the statements contained in the response of the Respondents and in light of the consistent rulings of this Court, I do not believe that it is appropriate to give binding validity to the ideas expressed in **Hamdan** with respect to a possible change in the Respondents' policy. The remarks made therein pointed to issues the Respondents should consider and their response indicates that these issues have indeed been considered and that there are substantive reasons not to alter the policy. The affidavit of response submitted by the Respondents, signed by COGAT, Major General Eitan Dangot, and the oral arguments made by counsel for the Respondents provided an explanation as to why it was difficult to perform individual screenings given the circumstances following Hamas' rise to power in the Gaza Strip and the Respondents' inability to collect information and data. Compelling the Respondents to establish an "exceptions committee" would inevitably require an individual examination of every single application, unlike the situation today, with respect to the applications of individuals who meet the criteria that have been established for approval of entry into Israel. I have not been convinced that Respondents' position that such screening is impossible, based on the current reality, is unreasonable.

3. As we have observed, the Court has thus far not detected extreme unreasonableness in the Respondents' policy, which includes criteria for types of cases in which entry into Israel would be permitted (with readiness to revisit these criteria periodically and adjust them to suit changing circumstances). Compelling the Respondents to establish an "exceptions committee" expresses a conclusion that establishing criteria with no mechanism for addressing exceptions constitutes an unreasonable policy which warrants intervention. I do not share such a conclusion. Indeed, along with the positivity of creating an additional route for applications to enter Israel, as pointed out by my colleague Justice **Rubinstein**, one cannot ignore the difficulties, including the one addressed by my colleague Vice President **Naor** and by the Respondents, namely, the difficulty to individually screen each and every application in a situation of armed conflict and with the applicants' being present in a "hostile territory" (as stated in Resolution B/34 of the Ministerial Committee for National Security). Ultimately, this is a matter for the competent policy makers. They are entrusted with the discretion and I have not seen any flaw in the manner in which their discretion has been exercised with respect to the absence of a possibility to individually screen each and every application.

   In other words, compelling the establishment of an exceptions committee is, in my view, a **material** change of the policy adopted by the Respondents and in which this Court has not seen fit to intervene in a number of rulings. It also undermines the "separation" policy, which is based on both political and security reasons, as specified in the affidavit of response, a policy which has not been found to be unreasonable. It also constitutes a certain departure from the premise that is accepted in case law, whereby foreign nationals have no vested right to enter Israel or territories under its control. Note – even today, this is not a "hermetic" policy that admits no exceptions, one that **might have** been found to be unreasonable if this were indeed the case. The Respondents' policy does not express a complete and blanket denial of the possibility to allow Gaza residents to enter Israel. The criteria that have been established allow granting a permit to enter Israel. These are the exceptions to the non-entry rule. Expanding the criteria in a vague and undefined manner constitutes a change of policy and, indirectly, a certain revocation of the criteria that have been established. A vague and undefined "super criterion" for "exceptional cases" would, to some extent, erode existing criteria, criteria in which the court has not seen fit to intervene. The lines would be blurred and every exception would inevitably lead to other exceptions, as demonstrated by my colleague, Vice President **Naor**.

4. My colleague, Justice **Rubinstein** relied heavily on the statements made in Sec. 6 of Exhibit P/20 to the petition, a document dated May 5, 2011, which originates in the office of the COGAT's spokesperson, which alleges that **all applications** are reviewed on their merits. However, this

statement is inconsistent with the affidavit of response submitted by the Respondents, which is likely meant to depict their policy more accurately. According to the affidavit of response, only if "the purpose for which transit is sought meets one of the criteria of exceptional humanitarian cases" is the individual matter of the applicant examined. The Respondents would be wise to bring the statements released by the spokesperson in line with the positions of the policy makers and the criteria. For the purpose of ruling on the proceeding at bar, I see fit to rely on the affidavit of response rather than the spokesperson's release.

I shall add that in view of the difficulty to perform an individual screening in each and every case, indeed, the fact that individual screenings are conducted in cases that meet one of the criteria does not imply that such screening is possible, effective or appropriate in every case to the extent that we should enforce the performance thereof on the Respondents.

5. In view of all the above, I concur that the *order nisi* must be revoked and the petition must be dismissed.

Justice

Decided by the majority as stated in the opinion of the Vice President and contrary to the dissenting opinion of Justice E. Rubinstein.

Given today 8 Tishrei 5773 (September 24, 2012)

Vice President Justice Justice
